

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:MAN:TL-N-2649-00  
MDWilder

date:

to: District Director, Manhattan District  
Attention: Laurie Gononsky

from: District Counsel, Manhattan

subject: Response to Request for Assistance  
[REDACTED]

U.I.L. #6501.08-09  
#6501.08-17  
#6241.00-00R96  
#6244.00-00R96

THIS DOCUMENT MAY INCLUDE CONFIDENTIAL INFORMATION SUBJECT TO THE ATTORNEY-CLIENT AND DELIBERATIVE PROCESS PRIVILEGES, AND MAY ALSO HAVE BEEN PREPARED IN ANTICIPATION OF LITIGATION. THIS DOCUMENT SHOULD NOT BE DISCLOSED TO ANYONE OUTSIDE THE IRS, INCLUDING THE TAXPAYER(S) INVOLVED, AND ITS USE WITHIN THE IRS SHOULD BE LIMITED TO THOSE WITH A NEED TO REVIEW THE DOCUMENT IN RELATION TO THE SUBJECT MATTER OF THE CASE DISCUSSED HEREIN. THIS DOCUMENT CONTAINS TAX INFORMATION OF THE INSTANT TAXPAYER WHICH IS SUBJECT TO I.R.C. § 6103.

Issues:

1. Who has authority to sign an extension of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED].

2. How should an extension of the statute of limitations in this case be worded.

3. How should a power of attorney for [REDACTED] for the years [REDACTED] and [REDACTED] be worded.

Facts:

This advice is subject to review by the National Office.

[REDACTED] (EIN [REDACTED]) filed Forms 1120S for the years [REDACTED] and [REDACTED]. The Form 1120S for the year [REDACTED] does not indicate that [REDACTED] is subject to the consolidated audit procedures of sections 6241 through 6245. There are 2 shareholders listed on the Forms 1120S for the years [REDACTED]

██████ and ██████. ██████ and ██████ are listed on Schedules K-1 for the years ██████ and ██████ for ██████ as having a ██████% and ██████% interest, respectively. There is no indication that an election was made under Temporary Treasury Regulation § 301.6241-1T(c)(2)(v) for ██████ for either of the years ██████ and ██████ to "have the provisions of subchapter D of Chapter 63 of the Code apply with respect to that corporation". See Temporary Treasury Regulation § 301.6241-1T(c)(2)(v)(A).

██████ signed the Forms 1120S for ██████ for the years ██████ and ██████ as Chief Executive Officer.

A Stock Purchase Agreement dated as of ██████ between ██████ and ██████, a New York corporation, and ██████, ("██████") provided that ██████ shall have the option to purchase certain stock of ██████.

Pursuant to a Contract Assignment dated ██████, ██████ assigned to ██████ all rights in the Stock Purchase Agreement dated as of ██████.

A Certificate of Amendment of Certificate of Incorporation for ██████ dated ██████ stated that the name of ██████ is changed to ██████.

██████ (Formerly ██████) Financial Statements dated as of ██████ state in Footnote 2, page 7, that "[e]ffective ██████, the Company's "S" Corporation status was terminated."

A Settlement Agreement dated ██████ provides, in part, on page 3, paragraph 5., that the ██████ option is deemed exercised and that the Escrow Agent is authorized to deliver to ██████ stock in ██████.

Pursuant to a Board of Directors Meeting of ██████ dated ██████, paragraph 5., "[t]he Board authorizes the General Counsel, ██████ to do all things necessary and appropriate to wind up the affairs of the company."

A letter dated ██████ states that "[t]his letter serves as confirmation that ██████ and ██████ resigned their positions as Officers and Directors of ██████

██████████ in ██████████. Therefore, ██████████, who was and is the Attorney of ██████████, is the only one who has any remaining authority to represent the company."

A Form 2848 for ██████████, formerly known as ██████████, (EIN ██████████), for income tax for the years ██████████ and ██████████ was signed on line 9 by ██████████ as General Counsel but undated. The above-stated Form 2848 designated ██████████ as the representative who signed the Form 2848 on ██████████. Laurie Gononsky in Manhattan Examination has indicated that she needs the Form 2848 to audit ██████████ for the years ██████████ and ██████████.

Law:

I.R.C. § 6501(a) provides the general rule that the amount of any tax shall be assessed within 3 years after the return was filed. I.R.C. § 6501(c)(4) provides an exception to the general rule. I.R.C. § 6501(c)(4) states that "Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title...both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

General Corporate Provisions:

An officer of a corporation may execute a consent. I.R.C. § 6061 requires, except as otherwise provided by I.R.C. § 6062 (signing of corporation income tax returns) and I.R.C. § 6063 (signing of partnership returns of income), that any return, statement, or document required to be made under any internal revenue laws or regulations must be signed in accordance with the applicable forms or regulations. The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under that section. Rev. Rul. 83-41, 1983-1 C.B. 349, provides that the Internal Revenue Service will generally apply the rules applicable to the execution of original returns to consents to extend the period of limitation for assessment. Thus, the rules applicable to the execution of corporate income tax returns are used to determine which individuals are authorized to sign a consent for a corporation.

I.R.C. § 6062 provides that a corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any

other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return on behalf of the corporation. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return.

S Corporation Provisions:

I.R.C. § 1361(a)(1) provides in general that the term "S corporation" means, with respect to any taxable year, a small business corporation for which an election under I.R.C. § 1362(a) is in effect for such year.

I.R.C. § 1361(a)(2) provides that the term "C corporation" means, with respect to any taxable year, a corporation which is not an S Corporation for such year.

I.R.C. § 1361(b)(1) provides in general, in relevant part, that the term "small business corporation" means a domestic corporation which does not (A) have more than 75 shareholders and (B) does not have as a shareholder a person who is not an individual.

I.R.C. § 1362(a)(1) provides in general that a small business corporation may elect to be an S corporation.

I.R.C. § 1362(d)(2)(A) provides in general that an election under I.R.C. § 1362(a) shall be terminated whenever such corporation ceases to be a small business corporation. I.R.C. § 1362(d)(2)(B) provides that any termination shall be effective on or after the date of cessation. I.R.C. § 1362(e)(1) provides in general that in the case of an S termination year (A) the portion of such year ending before the date of the termination shall be treated as a short taxable year for which the corporation is an S corporation and (B) the portion of such year beginning on the date of the termination shall be treated as a short taxable year for which the corporation is a C corporation. I.R.C. § 1362(e)(4) defines "S termination year" as any taxable year of a corporation in which a termination of an election takes effect.

I.R.C. § 6244 generally applies the partnership provisions to S corporations for taxable years beginning before January 1, 1997. I.R.C. § 6244 was repealed for years beginning January 1, 1997 or later. See P.L. 104-188.

Temporary Treasury Regulation § 301.6241-1T(c)(2) provides that where an S corporation has five or fewer shareholders the

tax treatment shall not be determined at the corporate level. Temporary Treasury Regulation § 301.6241-1T(c)(2)(v) provides that in general a small S corporation may elect to have the provisions of subchapter D of Chapter 63 of the Code, that relate to partnership provisions, apply with respect to that corporation.

New York Business Corporation Law Article 10 § 1005(a) (1999) provides that after dissolution (2) the corporation shall proceed to wind up its affairs and do all other acts appropriate to liquidate its business.

Discussion:

Issue 1. Who has authority to sign an extension of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED].

The question is who has authority to sign an extension of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED]. The answer to this question is affected by whether the adjustments with respect to [REDACTED] are made at the corporate level or the shareholder level. If the adjustments are to be made at the corporate level, then someone with authority to sign for [REDACTED] should sign the extension of the statute of limitations for [REDACTED] for the years [REDACTED] and [REDACTED]. If the adjustments are to be made at the shareholder level, then the shareholders would sign the extension of the statute of limitations for their years [REDACTED] and [REDACTED].

To determine whether the adjustments in this case are to be made at the corporate level or the shareholder level, the S corporation provisions of the Internal Revenue Code should be examined.

[REDACTED] meets the definition of an S corporation for the years [REDACTED] and [REDACTED] including the facts that it is a domestic corporation which does not have more than 75 shareholders and does not have as a shareholder a person who is not an individual. See I.R.C. § 1361(b)(1). Furthermore, [REDACTED] filed Forms 1120S for the years [REDACTED] and [REDACTED] as an S corporation.

When stock in [REDACTED] was sold to [REDACTED] in [REDACTED], [REDACTED]'s election to be an S corporation terminated since [REDACTED] could no longer be an S corporation when its shareholder, a corporation, was not an individual. See I.R.C. §§ 1362(d)(2)(A) and 1361(b)(1)(B).

In [REDACTED] when [REDACTED]'s S corporation status terminated, [REDACTED] became a C corporation. However, the termination was effective only after the date of cessation. See I.R.C. § 1362(d)(2)(B). As noted in I.R.C. § 1362(e)(1) in general in the case of an S termination year (A) the portion of such year ending before the date of the termination shall be treated as a short taxable year for which the corporation is an S corporation and (B) the portion of such year beginning on the date of the termination shall be treated as a short taxable year for which the corporation is a C corporation. Therefore, [REDACTED] remained an S corporation for the taxable years [REDACTED] and [REDACTED].

Under I.R.C. § 6244 the partnership provisions are generally applied to S corporations for the year [REDACTED]. However, Temporary Treasury Regulation § 301.6241-1T(c)(2) provides that where an S corporation has five or fewer shareholders the tax treatment shall not be determined at the corporate level. Since [REDACTED] only had 2 shareholders in the taxable year [REDACTED], the tax treatment is to be determined at the shareholder level. Since there is no evidence that [REDACTED] elected to apply the partnership provisions to it for the year [REDACTED], the statute of limitations to be extended is that of the shareholders for the year [REDACTED]. See Temporary Treasury Regulation § 301.6241-1T(c)(2)(v) and I.R.C. § 6501(c)(4). For the year [REDACTED], I.R.C. § 6244 was repealed so the partnership provisions do not apply to S corporations for that year. Therefore, the statute of limitations to be extended is that of the shareholders for the year [REDACTED] as well. See P.L. 104-188 and I.R.C. § 6501(c)(4). Therefore, any extensions of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED] should be obtained from [REDACTED] and [REDACTED] for their individual income tax returns, Forms 1040, for the years [REDACTED] and [REDACTED]. There is no need to obtain an extension of the statute of limitations to assess from [REDACTED] with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED].

Issue 2. How should an extension of the statute of limitations in this case be worded.

Since the extension of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED] should be obtained from [REDACTED] and [REDACTED] for their individual income tax returns, Forms 1040, for the years [REDACTED] and [REDACTED], the extensions should simply identify [REDACTED] and [REDACTED], their Social Security Numbers, and the tax periods.

Issue 3. How should a power of attorney for [REDACTED] for the years [REDACTED] and [REDACTED] be worded.

Form 2848 provides on page 2, line 9, signature of taxpayer that any power of attorney signed by a corporate officer certifies that the corporate officer has authority to execute the form on behalf of the taxpayer.

As stated in a Board of Directors Meeting of [REDACTED] dated [REDACTED], paragraph 5., "[t]he Board authorizes the General Counsel, [REDACTED] to do all things necessary and appropriate to wind up the affairs of the company."

Furthermore, a letter dated [REDACTED] states that "[t]his letter serves as confirmation that [REDACTED] and [REDACTED] resigned their positions as Officers and Directors of [REDACTED] in [REDACTED]. Therefore, [REDACTED], who was and is the Attorney of [REDACTED], is the only one who has any remaining authority to represent the company."

New York Business Corporation Law Article 10 § 1005(a) (1999) provides that after dissolution (2) the corporation shall proceed to wind up its affairs and do all other acts appropriate to liquidate its business.

Therefore, [REDACTED] can sign a power of attorney for [REDACTED], formerly known as [REDACTED], as General Counsel for the years [REDACTED] and [REDACTED].

#### Conclusion:

1. Any extensions of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED] should be obtained from [REDACTED] and [REDACTED] for their years [REDACTED] and [REDACTED]. There is no need to obtain an extension of the statute of limitations to assess from [REDACTED] with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED].

2. Since the extension of the statute of limitations to assess with respect to tax attributable to items of [REDACTED] for the years [REDACTED] and [REDACTED] should be obtained from [REDACTED] and [REDACTED] for their years [REDACTED] and [REDACTED], the extensions should simply identify [REDACTED] and [REDACTED], their Social Security Numbers, and the tax periods.

3. [REDACTED] can sign a power of attorney for [REDACTED], formerly known as [REDACTED], as General Counsel for the years [REDACTED] and [REDACTED].

This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case.

#### PROCEDURAL CONSIDERATIONS

Please note that Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayers when you solicit the consents. Alternatively, you may advise the taxpayers orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document your actions in this regard in the case files.

In addition to the recommendations made herein, we further recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit a Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return a signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file(s) as directed. When the signed Forms 872 are received from the taxpayer the responsible manager should promptly sign and date them in accordance with Treasury Regulation § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the respective statutes of limitations in the continuous case management statute control files and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.



If you have any questions, please call Michael Wilder at  
(212) 264-5473 Extension 226.

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